United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

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P/S

74-1611

In The

United States Court of Appeals

For The Second Circuit

REA EXPRESS, INC.,

Petitioner,

BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al.,

Intervenors,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIR FREIGHT FORWARDERS ASSOCIATION, et al.,

Intervenors.

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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12

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Contents

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FOR THE SECOND CIRCUIT

REA EXPRESS, INC., Petitioner,	:	
BROTHERHOOD OF RAILWAY AND AIRLINE CLERKS, et al., Intervenors,	:	No. 74-1611
-against-	:	PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC
CIVIL AERONAUTICS BOARD, Respondent,	:	
AIR FREIGHT FORWARDERS ASSOCIATION, et al., Intervenors.	:	

Preliminary Statement

This petition for rehearing is applicable to this Court's decision dated October 6, 1975, and is submitted pursuant to Rule 40 of the Federal Rules of Appellate Procedure, on behalf of REA Express, Inc. ("REA"), petitioner herein. Combined with the petition for rehearing is a suggestion for rehearing en banc as permitted under Rule 35 of the Federal Rules of Appellate Procedure. The suggestion is made because of the

extraordinary importance of the decision to REA in its precarious financial condition, because of the importance of the constitutional rights claimed, and because of the relationship between this case decided by a panel comprised of Judges Smith, Hays, and Mansfield, and a prior appeal in this Court which a panel comprised of Judges Moore, Smith, and Timbers dismissed on grounds of mootness (Docket No. 35474).

We realize that views have not coalesced on the precise circumstances in which en banc procedures are appropriate or desirable, see Comment, "In Banc Procedures in the United States Court of Appeals," 43 Ford. L. Rev. 401 (1974), and accordingly request that this petition be considered as a petition for rehearing if en banc proceedings are not adopted. See Advisory Committee Note, Fed. R. App. P. 35, 28 U.S.C. (1970).

I. THE IMPORTANCE OF THE DECISION

The importance of this case and the many interests directly involved in it are reflected in the affidavit of Mr. A. Ernest Larsen submitted herewith. Mr. Larsen, REA's Treasurer and Controller, a career employee, having served in a variety of financial capacities for over twenty-seven years, was formerly a special agent with the

Federal Bureau of Investigation and an auditor. As he approaches retirement age, with his continued employment and employment benefits such as health and welfare insurance and life insurance in jeopardy, and pension benefits which are not fully funded, Mr. Larsen is in a position similar to that of thousands of other REA employees.

REA is now operating as a "debtor-in-possession" under Chapter XI of the Bankruptcy Act. It is urgently striving to develop a successful plan of reorganization. It is operating with the cooperation of a Creditors' Committee elected pursuant to Chapter XI which has been carefully examining and evaluating every major development. In the opinion of the Creditors' Committee, the decision to terminate Air Express seriously impairs if not renders impossible the development of a successful plan of reorganization.

This is simply because REA does not have the funds or financial resources to survive the shock of such a termination and conversion into air freight forwarding. As shown in Mr. Larsen's affidavit, such a conversion would involve substantial changes in operations, in facilities, in marketing approach, in customers, in employee practices and training requirements. Even if REA could make those changes, it does not have the working

capital or reserves necessary to absorb start-up losses. At the time of its Chapter XI filing, on February 18, 1975, the company had a negative net worth of approximately $11 million. Very substantial progress in reducing costs has been made since then, but the company lacks the capital to implement the Board's decision and survive.

Thus, in the present circumstances, the decision to terminate Air Express becomes a corporate death sentence for REA affecting the interests of its employees, its creditors, and the shipping public. This was a condition not contemplated by the Civil Aeronautics Board at the time of its decision, which it viewed as giving REA "a genuine opportunity to rehabilitate its finances" by becoming an air freight forwarder. (J.A. 671 (a).)

This Court's decision of October 6, 1975, relied on that conclusion: "... the Board apparently recognizing employee welfare as a factor to be considered in deciding what course would be in the public interest ... granted air freight forwarder authority to REA specifically on the ground that its operation as a freight forwarder would provide the best opportunity to benefit its employees". (Slip Opinion, 6315-6316.)

We respectfully disagree with that conclusion even based upon the record as it was presented in a hearing which ended in 1971. (J.A. 20(a).) But as applied to a

situation which exists in October 1975, following substantial and profound changes of circumstances, not made the subject of a hearing before the Board, we submit that the application of a false premise, namely that air freight forwarding will be of benefit, when in fact the effect of such a decision will be to wipe out the company, its jobs, and the public services it performs, represents a denial of due process in a very basic way. REA, its management, its employees, its creditors, and its customers, all of whom have the greatest and most direct interest in the survival of the company and its services, and who have no motive whatsoever for seeing the wrong choice made, all believe the forced conversion of the company into air freight forwarding at this time would be not "the best opportunity", but a disaster.

In such circumstances, the Due Process Clause of the Fifth Amendment requires that the issue of what is "the best opportunity" be determined on something other than a record nearly four years old. "... some kind of hearing is required at some time before a person is finally deprived of his property interests." Wolff v. McDonnell, 418 U.S. 539, 557-8 (1974). We submit that such a "hearing" must take place with respect to the factual situation as it exists in some reasonable time relationship to the period in which the deprival of

property interests occurs. In this case, following the hearing in the Air Express Service Investigation, there have been significant developments involving REA, other carriers, and in the industry itself, which would make the prior hearing ending in 1971 inadequate for constitutional purposes: (1) since its filing under Chapter XI on February 18, 1975, REA functions as "a new juridical entity" (see Brotherhood v. REA Express, Inc., New York Law Journal, September 15, 1975, p. 1 (2d Cir., Dkt. Nos. 75-5007, 75-5008, August 27, 1975); (2) as a "debtor-in-possession", REA is now operating for the benefit of its creditors, not directly for its stockholders; (3) there are not enough assets to satisfy the creditors if the company should fail; (4) the changing factors affecting the national economy, halting REA's turn-around in 1974, have had a substantial negative effect; (5) significant competitive changes have occurred in the small shipments portion of the relevant air transportation market; and (6) the opportunities for REA's long-time employees to obtain suitable alternative employment are much less at present than at the time of the CAB's decision. Finally, REA and the airlines have made significant changes in the Air Express Agreement and tariff. While these changes were not deemed acceptable by the Board on reconsideration (without a hearing), they

nevertheless displayed a positive and cooperative attitude toward making constructive changes in the Air Express arrangement.

Finally, whether Air Express is ultimately preserved or not, basic fairness to REA in its struggle to survive requires the continuation of Air Express at least until the economic claims discussed infra in Point III are determined. Those claims in themselves could provide the economic basis for the conversion in REA's business and operations which the Board desires.

Rather than citing extensive authorities here on the requirement of a hearing, we respectfully invite the Court's attention to the analysis of the cases in Friendly, "Some Kind of Hearing", 123 U. Pa. L. Rev. 1267 (1975). Under the criteria which have evolved from the recent decisions of the Supreme Court, we submit that a hearing is required here on the issue of what is REA's "best opportunity" to survive in its present circumstances, the shipping public's best opportunity to continue to receive desired services, the creditors' best opportunity to receive reasonable compensation for their claims, and the long-time employees' best opportunity to retain their jobs and their employment benefits rather than being thrown out on the street at an advanced age. Even the termination of welfare

benefits without a hearing has been held to infringe upon due process, see Goldberg v. Kelly, 397 U.S. 254 (1970), and as stated in the analysis in the article referred to above, in a constitutional scale of values, "there is a human difference between losing what one has and not getting what one wants", a distinction which "is valid in economic regulation", also, because "capital has been expended, investor expectations have been aroused, and people have been employed". (Id. at 1296.)

Fundamental to the idea of a hearing is the right to know the evidentiary basis upon which the administrative agency relies in concluding that REA's operations as a freight forwarder will provide REA "a genuine opportunity to rehabilitate its finances". (J.A. 671(a).) This need is especially apparent when such a position is diametrically opposed to the information available to those who are most directly affected by the decision. As stated in the article cited above, "There can likewise be no fair dispute over the right to know the nature of the evidence on which the administrator relies." (Id. at 1283.) As stated in 2 Davis, Administrative Law § 15.14, p. 432,

> "The cardinal principle of fair hearing is ... that parties should have the opportunity to meet in appropriate fashion all facts that influence the disposition of the case .... Nothing short of bringing

> the facts into the record, so that an unabridged opportunity is allowed for cross-examination and for presentation of rebuttal evidence, will suffice for the disputed adjudicative facts at the center of the controversy."

Finally, "The required degree of procedural safeguards varies directly with the importance of the private interest affected ..." (article cited supra, at 1278), and the importance and magnitude of the public and private interests affected in this litigation would justify a higher degree of procedural safeguards than those in most if not all the cases in which the Supreme Court has recently ruled that due process requirements were applicable.

II. THE "PUBLIC INTEREST" INVOLVED IN THIS CASE TRANSCENDS THE JURISDICTION OF ONE ADMINISTRATIVE AGENCY

The deference normally accorded to the determination of an administrative agency should be qualified in this case by consideration of the limitations involved in the scope of the CAB's determination as it relates to the "public interest" in REA's overall operation. As shown in Mr. Larsen's affidavit, at present levels, Air Express accounts for approximately 30% of REA's total revenues. The rest is derived from surface express. In the surface express portion of its operation, REA operates under certificates of public convenience and necessity

which have been issued by the Interstate Commerce Commission and various state agencies. Those certificates therefore are in effect determinations by other independent regulatory agencies that, because of the public convenience and necessity, REA's surface express operations are very much in the public interest. By placing the continuation of these operations in jeopardy, the Civil Aeronautics Board has affected a sector of the public interest with respect to which it has no statutory jurisdiction. For over one hundred years, inter-modal operations have been a characteristic of the Express Company. The regulation of its various activities, however, has been on a segmented basis, with various different agencies having responsibility for defining differing aspects of the "public interest" as it relates to REA's operations. In this case, approximately two-thirds of REA's revenues are derived from surface express operations regulated by the Interstate Commerce Commission and the regulatory agencies of the various states throughout the United States. To permit the determination by an agency which has an impact upon substantially less than half of the total of the operation conducted in the public interest to place in grave jeopardy the continuation of the remainder of the operation would be to undercut the regulatory authorities and responsibilities of the other agencies affected in a way which

Congress could not have intended. For that reason, the importance of a full and fair hearing on whether or not a conversion to air freight forwarding is indeed REA's "best opportunity" for survival becomes not only a constitutional mandate, but also one which is most consonant with the statutory framework and the jurisdictions of other independent regulatory agencies.

III. THE BOARD HAS FAILED TO ACT IN A TIMELY MANNER ON THE BASIS OF THE REPRESENTATIONS MADE AT THE TIME THE PRIOR APPEAL WAS DISMISSED

In Docket No. 35474, REA had petitioned for review from the Board's initial dismissal of its Petition and Complaint raising the key economic issues left undecided by this appeal. REA then contended that the dismissal of the Petition and Complaint was prejudicial to it because it would deprive REA of the opportunity to obtain financial relief through retroactive adjustment of "divisions" paid to the airlines for their services. REA's Petition and Complaint is set forth in the record herein beginning at J.A. 29(a).

As a result of REA's appeal, the Board reinstated the Petition and Complaint and then moved this Court to dismiss the appeal on the ground that it had become moot. (J.A. 279(a).) In the motion, the CAB made the following statements (J.A. 282(a)-283(a)):

"5. REA filed its brief in this Court on January 20, 1971. From that brief it now becomes clear for the first time that the gravamen of its petition is a contention that should the Board ultimately direct an adjustment of divisions of joint rates, pursuant to Section 1002(h) of the Federal Aviation Act of 1958 (49 U.S.C. 1482(h)), it will be unable to make such an adjustment retroactive to the date of REA's dismissed complaint. Since Section 1002(h) provides that the Board's power to require the adjustment of divisions cannot antedate 'the date of filing the complaint or entry of order of investigation . . .', REA stresses that the practical effect of the Board's dismissal of its 'Petition and Complaint' and the subsequent institution of the investigations is to deprive it of an opportunity for an adjustment of the divisions for this interim period between the filing of the complaint (April 9, 1970) and the date the institution of the investigations (July 23, 1970) (Pet. Br., 13, 15).

"6. Now that REA has articulated its true grievance, the Board has taken steps to afford the relief requested without the necessity of further litigation. By Order 71-2-68, dated February 12, 1971 (annexed hereto as Appendix A), the Board has reinstated the 'Petition and Complaint' of REA for the sole purpose of preserving for Board determination the possibility of a retroactive readjustment of the fare divisions from April 9, 1970. Revival of the dismissed complaint allows the Board to provide REA a retroactive readjustment of joint fare divisions back to April 9, 1970, the date of the filing of

> the REA 'Petition and Complaint,' should the Board otherwise determine in the pending investigation (1) that it has the power to determine the divisions between REA and the carriers, (2) that it has the power to compel a retroactive readjustment of such divisions, and (3) that such action would be 'just, reasonable, and equitable' (Section 1002(h) of the Act (49 U.S.C. 1482(h)). Thus insofar as the dismissal of REA's 'Petition and Complaint' alone would have prevented the Board from giving relief to REA back to April 9, 1970, the Board has remedied the situation by the issuance of Order 71-2-68. 2/ Of course, any determination made by the Board to grant or withhold such relief in the pending investigations will be subject to judicial scrutiny under Section 1006 of the Act (49 U.S.C. 1486)."

> 2/ The Board stated in the order of reinstatement that it was not necessary to consider whether the dismissal of the 'Petition and Complaint' would, as a matter of law, foreclose the possibility of retroactive relief from the date of filing (Appendix A, p. 1).

On the strength of such representations, a panel of the Court comprised of Judges Moore, Smith, and Timbers dismissed the appeal on March 15, 1971. (J.A. 289(a).)

However, the basic issues raised therein still have not been decided. As computed by REA's expert witness before the Board, the amount of overpayment to the airlines would have been in the approximate amount of

at least $1 million per month retroactive to April 9, 1970. (J.A. 776(a).) The claims were left undecided because the Board found the record to be inadequate and the case not ripe for judicial review. (J.A. 874(a).) Rather than ordering an adequate record to be prepared so that final legal and economic determinations could be made, however, the Board shunted the proceeding off the track by ordering "informal conferences" (875(a)), finding a lack of any irreparable injury to REA (874(a)). However, if irreparable injury was not clear then, it is overwhelmingly clear now. Recovery of REA's substantial claims for retroactive adjustments would both assure the survival of the company and also enable it to make a successful conversion of its business and operations as desired by the Board.

To place this proceeding in the necessary perspective, it is important to remember that REA originated Air Express in 1927. Its subsequent operation of the service was within the framework of a determination that the service was in the public interest. When the Board decided in 1973, contrary to the determination of its Administrative Law Judge, that the public interest no longer required the continuation of the service, it did so not in response to the request of any shippers using the service. Those shippers overwhelmingly requested the continuation of the service. The proceeding did not result from the complaints of competitors, and the Board did not make its determination based upon any decline in competition in the air cargo field.

There has been a great increase in such competition. Nor was the Board's action prompted because it felt that an interline priority service for small parcels is no longer needed. On the contrary, the Board has continued to emphasize the otherwise unfilled need for such service. The Board's action was not commenced because of these or any other factors. Instead, it was in response to REA's own petition -- a petition filed in an effort to make the improvements in Air Express which would reflect suggestions previously made by the Board itself, and to obtain equitable treatment in the amounts paid to the airlines.*

Thus a good faith effort at improvement and responsiveness to the Board's previously stated desires was met with a knuckle-rapping response. The service previously found to be in the public interest and performed as such for over forty years was suddenly ordered discontinued in the very proceeding in which (a) the Board was asked to implement those improvements which it had previously recommended, and (b) certain statutory rights which would restore financial health to the company were claimed but left undecided. We submit that basic principles of fair play dictate more reasonable treatment of a long-time corporate public servant than at one fell swoop to knock out the

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*The Court's opinion errs in indicating that dual authority to provide both Air Express and air freight forwarding service was a primary objective of REA. (Slip Op. 6308.) Dual authority was requested only as an alternative position if other improvements in Air Express were not made.

underpinning of its authority, and at the same time to leave undecided statutory claims which could provide the economic means to weather the shock and survive.

Further, we submit that such a determination is required as a condition precedent to a decision to terminate Air Express itself since the statute requires the Board to consider "the need in the public interest of adequate and efficient transportation of ... property by air carriers at the lowest cost consistent with the furnishing of such service". (49 U.S.C. § 1482(e) (1) & (2).) (Emphasis added.) Such a crucial decision therefore may not be swept under the rug in making a determination with respect to the continuation of Air Express itself,* and the "hidden cost" of regulation, when the regulatory agencies fail to take such considerations into account, has been the subject of much recent criticism.

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*Cf. National Small Shipments Traffic Conference Inc. v. United States, 321 F.Supp. 500 at 510 (S.D.N.Y. 1970); three-judge court, opinion by Judge Friendly); see also Atchison Topeka & Santa Fe Railway Co. v. Wichita Board of Trade, 412 U.S. 800, 817 (1973) ("But, as in that case, it must make these reasons known to a reviewing court with sufficient clarity to permit it to do its job. Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they propose to maintain are reasonable rates for the service they intend to provide.").

REA's position on this is quite simple: because it is a going concern with relatively low labor and facilities costs, costs which are shared with surface transportation operations, REA can provide Air Express services at less cost than comparable services can be provided by any other carrier. The Board may not deny that it wants a priority service to continue: it has said so over and over in its orders relating to airline discussions on the subject. REA therefore contends that it is entitled to a comparative determination of the cost of the service provided by it in combination with the airlines as compared with the cost of any new or alternate service, including the "start-up costs", which would be involved.

By not deciding the issues of costs and substantial statutory claims so that they could be subjected to judicial review, putting the decision in the Service case ahead of such issues procedurally, the Board deprived REA and the shipping public of important statutory rights to their substantial prejudice. While the statute does not contain a specific time limit in which the Board must make its determination, the Administrative Procedure Act provides that a reviewing Court shall "(1) compel agency action unlawfully withheld or unreasonably delayed ...." (5 U.S.C. § 706.) Unnecessary delay beyond the point at

which it could rescue a troubled public service is, we submit, ipso facto unreasonable.

CONCLUSION

The petition for rehearing should be granted.

Dated: New York, New York
October 20, 1975

Respectfully submitted,

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REA Express v. C.A.B.

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, MURIEL MAYER , being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Petitioner.

That on the 20th day of October , 19 75 I served the within Petition for Rehearing, etc. in the matter of REA EXPRESS, INC. v. CIVIL AERONAUTICS BOARD , upon (SEE ATTACHED LIST)

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayers

Sworn to and subscribed before me this 20th day of October 19 75.

Lorraine Leotta
A Notary Public of the State of New Jersey.

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